

# REDACTED

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 99-739

February 3, 2000

CENTRAL MAINE POWER COMPANY  
AND CMP NATURAL GAS, L.L.C.,  
Request for Approval of Affiliated Interest  
Transaction, Sale of Assets (Property)

EXAMINER'S REPORT

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**NOTE: This Report is written in the form of a draft Commission Order. However, it constitutes the Advisory Staff's recommendation for resolution of this proceeding and does not constitute Commission action. Parties may give Oral Exceptions to the Report on Tuesday, 2/8/00 at 10:00 a.m. at the Commission premises. Deliberations are scheduled immediately following.**

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## I. SUMMARY

We approve the agreements between affiliates Central Maine Power Company (CMP) and CMP Natural Gas, L.L.C. (CMPNG) to allow the transfer of property rights and the shared use of CMP's electric corridor in Westbrook necessary for CMPNG to serve the Calpine electric generation facility at the value we determine herein.

We also require CMP Group and these affiliates to implement certain standards of conduct and to structure its business practices as described herein to ensure that the future dealings between these affiliates and between CMP and non-affiliated natural gas pipeline competitors seeking to use its electric corridors will be fair.

## II. BACKGROUND

The purpose of this proceeding is to review the proposed agreements between public utility affiliates, CMP and CMPNG, for sale of easements to CMPNG and allow it use of CMP's electric corridor in Westbrook for natural gas pipeline facilities to serve the Calpine electric generation facility. We must determine whether the proposed agreements are, or are not, "adverse to the public interest." 35-A M.R.S.A. §707. In so doing, we will review whether the affiliates engaged in inappropriate or anti-competitive practices.

This proceeding follows a related case, Docket No. 99-477, in which we granted CMPNG authority to provide service to the Calpine electric generation facility in Westbrook and to provide general service within the adjacent municipality of Gorham. *CMP Natural Gas, L.L.C., Petition for Approval to Furnish Gas Service in the Municipalities of Westbrook and Gorham* (§2105) and *Central Maine Power Company and CMP Natural Gas, L.L.C., Request for Approval of Affiliated Interest Transaction, Sale of Assets (Property)*, Order (Dec. 13, 1999) (December 13<sup>th</sup> Order).<sup>1</sup> Northern Utilities, Inc. (Northern), a local distribution company (LDC) that is authorized to serve, and is currently serving, in Gorham and Westbrook vigorously contested CMPNG's application for service authority and alleged that inappropriate affiliate dealings between CMP and CMPNG resulted in competitive unfairness to it.

Consequently, we stated that we would further review the affiliated interest transaction between CMP and its affiliate, CMPNG, for access to and use of CMP's electric corridor necessary to serve the Calpine facility, to determine whether the dealings between these affiliates were appropriate and competition for access to and use of the electric utility right-of-way (ROW) was fair. *Id.* at 37. In particular, this review encompassed further evaluation of whether the actions of these CMP Group affiliates had resulted in any competitive unfairness to Northern as alleged in Docket No. 99-477,

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<sup>1</sup> These proceedings overlapped to some extent so some of the initial rulings bear both docket numbers.

now with the added participation of CMP, a key participant in the negotiations for use of the electric corridor. We incorporated the record in Docket No. 99-477 into Docket No. 99-739 to avoid the need to duplicate evidence already provided and to facilitate further review of competitive fairness and affiliate dealings issues.

Finally, we indicated that we would consider "whether it is desirable to open a proceeding to consider the issues surrounding affiliate access to public utility corridors in a broader context." See *Order* at pgs. 36-37.

The parties to this proceeding include both affiliates, CMP and CMPNG, as the applicants, and Northern who opposes the application. Other participants in both dockets included other natural gas pipeline and distribution companies that provide service and/or have facilities located in Maine: Bangor Gas Company, L.L.C. (Bangor Gas) and Maritimes & Northeast Pipeline, L.L.C. (MNE). Both Bangor Gas and MNE participated to advocate for fair and open access for natural gas suppliers to CMP's electric corridors. The Office of the Public Advocate (OPA) also actively participated, undertaking a detailed investigation of the facts surrounding the affiliate dealings.<sup>2</sup>

The record in this case consists of the following: the record in Docket No. 99-477; prefiled written testimony; the depositions of Messrs. Michael D. Petit, P. Malcolm Jarvis, John Flumerfelt, and Thomas G. Quine in their entirety; all hearing transcripts and exhibits; all responses to Advisory Staff Data Requests; and any other items formally admitted into the record by the Hearing Examiner during the course of this proceeding.

In addition, the motions of Northern to admit late-filed exhibits Oral Data Requests #01-01, 01-02 and supplemental response, and 01-03 and of OPA to admit the response to OPA-02-05 are granted without objection.

### III. LEGAL STANDARDS

#### A. Section 707: Affiliated Interest Transactions

This case presents for our review several contractual arrangements made between CMP and CMPNG for access to and use of the CMP corridor. These include the Assessment Agreement executed in October 1998 and its amendment in April 1999 to extend to the corridor at issue in this proceeding, as well as the five agreements detailing the terms of sale and use of the CMP corridors to or by CMPNG.

Section 707(3) of Title 35-A states:

No public utility may ...make any contract or arrangement for the furnishing of management, supervision of construction, engineering, accounting, legal, financial or similar services,

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<sup>2</sup> The City of Westbrook intervened but did not participate.

or for the furnishing of any service or real or personal property other than those enumerated with any affiliated interest until the commission finds that the contract or arrangement is not adverse to the public interest and gives the contract or arrangement its written approval.

Subsection G of §707(3) also requires the Commission to determine the value of utility facilities, services or intangibles when a contract or arrangement involves their use by an affiliated interest.

In addition, Chapter 820 of the Commission's Rules contains Standards of Conduct that require a utility to provide information equally to affiliated and non-affiliated companies and forbids a utility to "act in preference to its affiliate or affiliates in providing access to utility facilities or in influencing utility customers to use the services of its affiliates." Ch. 820(8)(C).

B. Section 1101: Sale of Public Utility Property

This transaction also involves the sale and encumbrance of CMP's electric transmission right-of-way to allow CMPNG to construct, operate, and maintain a natural gas pipeline system serving the Calpine generation plant. The pipeline route from the interstate pipeline to the Calpine plant follows the CMP corridor.

The Commission must authorize the sale, lease or encumbrance of utility property necessary or useful in the performance of its duties to the public. 35-A M.R.S.A. § 1101(1). The utility does not require approval if the property at issue does not materially affect the ability of the utility to perform its duties to the public. 35-A M.R.S.A. §1101(4).

C. Stipulation

Finally, we must review a stipulation executed by three of the parties to this proceeding: CMP, CMPNG, and OPA. Our long-standing policy is to review stipulations to ensure that they are in the public interest. Our criteria for approving stipulations include:

- 1) that the parties joining the stipulation represent a sufficiently broad spectrum of interests that the Commission can be sure that there is no appearance or reality of disenfranchisement;
- 2) that the process that led to the stipulation was fair to all parties;
- 3) that the stipulated result is reasonable and is not contrary to legislative mandate. See *Central Maine Power Company, Proposed Increase in Rates, Docket No. 92-345(II)*, Detailed Opinion and Subsidiary Findings (Me. P.U.C. Jan. 10, 1995), and *Maine Public Service Company, Proposed Increase in Rates (Rate*

- Design*), Docket No. 95-052, Order (Me. P.U.C. June 26, 1996); and
- 4) that the overall stipulated result is in the public interest. See *Northern Utilities, Inc., Proposed Environmental Response Cost Recovery*, Docket No. 96-678, Order Approving Stipulation (Me. P.U.C. April 28, 1997).

#### IV. STIPULATION: DESCRIPTION AND ANALYSIS

On January 12, 2000, the OPA, CMP, and CMPNG jointly filed a stipulation proposed to resolve this proceeding. The filing indicates that Northern opposes the stipulation, and BGC and MNE take no position on the stipulation.

On January 13, 2000, the Hearing Examiner denied the stipulating parties' request to suspend the briefing schedule and stated that the Commission would consider the proposed stipulation along with the merits of this case at its scheduled deliberations.

##### A. Stipulation Provisions

The following is a summary of the substantive provisions of the Stipulation:

- 1) There is no evidence that Calpine's decision to contract with CMPNG resulted from any inappropriate affiliate dealings or was influenced by the corporate relationship of CMP and CMPNG. Calpine's selection process "resulted in reasonable commercial terms and conditions."
- 2) There is no direct or probative evidence of inappropriate dealings by CMP and CMPNG or that any of their dealings were to the detriment of Northern or any party that submitted a proposal to Calpine. There is no substantial evidence that CMPNG received preferential treatment by CMP.
- 3) The proposed transaction should be approved by the Commission under 35-A M.R.S.A. §§ 707 and 1101 because the consideration, terms and conditions, for the proposed transaction are reasonable, the transaction will result in positive benefits to the public, and the proposed transaction is not adverse to the public interest.

##### B. Analysis

We now apply the criteria for approval of stipulations described above to this proposed stipulation. First, we must ask whether the parties joining the stipulation

represent a sufficiently broad spectrum of interests to assure us that there is neither the appearance or reality of disenfranchisement.

The complete list of participants in this proceeding is as follows:

- two CMP Group affiliates/applicants – CMPNG, a natural gas distribution company (LDC), and CMP, an electric transmission and distribution company;
- two unaffiliated LDCs – Northern and Bangor Gas, competitors of CMPNG and entities likely to seek access to CMP corridors for placement of gas facilities;
- an interstate pipeline company – MNE, a competitor to some degree with CMPNG, Northern and Bangor Gas that uses CMP's electric corridors for its pipeline; and
- the Public Advocate, representing the broad public interest.

This spectrum covers a broad range of interests, from sympathetic sibling to vigorous competitors, as well the more objective presence of the OPA.

Three parties are signatory to the Stipulation: OPA, CMP and CMPNG. We have recognized in past decisions that a stipulation that does not have OPA support is unlikely to satisfy our concern that the broader public interest is being served by the settlement. Here, we note that OPA is the only stipulating party other than the joint applicants. The three non-signatory parties – Northern, Bangor Gas, and MNE – are all competitors of either or both CMP and CMPNG. The competitors have not had access to the complete information in this proceeding because of confidentiality constraints on competitive information.

Both Bangor Gas and MNE have indicated that their interest in this proceeding is in supporting a policy of open and fair access to CMP's electric corridors for gas pipeline projects. Neither takes a position on the specific allegations of competitive unfairness raised by Northern. The majority of the evidence in this proceeding involves these allegations. Finally, only OPA and Advisory Staff have had free access to information regarding the price of this transaction and prior pipeline easement sales. Notably, the four natural gas entities and the electric entity each have unique perspectives and particular goals in this proceeding.

While the fact that this stipulation is supported by one significant, public interest party carries weight, a settlement that leaves out a key complainant in this case – Northern – requires much scrutiny to ensure that Northern's concerns and allegations have been adequately addressed. The nature of the evidence in this case and the magnitude of potential harm require us to review the record and arguments in close

detail to ensure that the resolution of this matter is fair and thorough. We will, therefore, review this case on its merits, rather than in the context of the proposed stipulation.

## V. POSITIONS OF THE PARTIES

### A. Northern Utilities, Inc.

Throughout Docket No. 99-477 Northern alleged that affiliated dealings between CMP and CMPNG created an unlevel playing field in the competition to obtain Calpine's Westbrook generation facility as a customer. In particular, Northern charged that CMP may have afforded its affiliate, CMPNG, preferential treatment in gaining information about and access to the electric corridor that is essential to serving the facility. Ultimately, we found no clear evidence of such preferential treatment in Docket No. 99-477 and granted CMPNG authority to serve the facility, but found that further review of the affiliate dealings in this docket would be warranted, particularly given that CMP was not a party to the predecessor case.

In this proceeding, Northern maintains that new evidence reveals that CMP's employed, and subtly communicated to Northern, a policy discouraging the use of its electric corridors by other utilities for parallel facilities while simultaneously encouraging its own affiliate's use of the corridor. Northern cites the ease with which CMPNG achieved assurance of access to the corridor and reached a sale price as clear evidence that CMP treated CMPNG preferentially.

### B. OPA

The OPA investigated two questions, as follow:

- Had CMP and CMPNG attempted to hamper other gas companies from getting access to the CMP ROW, such as had CMP provided information about its ROW to its affiliate but not to other competitors?
- Did CMP and CMPNG make any attempt to induce Calpine to select CMPNG to build the lateral in order to gain preferential treatment for electric transmission from CMP?

Affirmative responses to either would indicate inappropriate and competitively unfair actions by these utilities. OPA concluded that there was insufficient evidence to constitute an affirmative response to the first hypothetical, although CMPNG clearly had easy access to the ROW, and there was no evidence to suggest an affirmative response to the second on this record. The OPA states

While there are troubling aspects to the interaction between these affiliated companies with respect to the use of the Calpine right-of-way, none are of sufficient significance to cause the Public Advocate to oppose the application.



Consequently, OPA executed a stipulation supporting the approval of the affiliate agreements to allow CMPNG to purchase CMP's ROW for the purpose of building and operating a high pressure gas pipeline to serve the Calpine facility in Westbrook.

C. CMP and CMP Natural Gas, L.L.C.<sup>3</sup>

CMP and CMPNG maintain that there is no basis on the record for Northern's allegations that it received discouraging, discriminatory treatment from CMP that hampered it in the competition to serve Calpine. They argue that CMP personnel responded appropriately to Northern's general inquiry and would have been responsive to an explicit request from Northern to obtain access to the Calpine ROW had it made one. Further, they contend that the Assessment Agreement was "irrelevant" to the competition to serve Calpine since it was executed, and CMPNG did not access the corridor until, after the bids were submitted. They also note that Northern's agent, Mr. Flumerfelt, was familiar with Assessment Agreements from his work with the Portland Natural Gas Transmission System (PNGTS) and that other competitors, such as MNE, did not require an Assessment Agreement to prepare their bids. Moreover, they argue that Northern's allegations of harm ring particularly hollow because its management chose not to submit a bid to Calpine, opting instead to submit one on behalf of Granite State Gas Transmission Company (Granite State), Northern's affiliate.

Finally, CMP argues that the purchase price for its sale of property rights to CMPNG is reasonable because it is comparable to those received from other natural gas pipelines in similar transactions and the terms of the agreements are largely the same as its contracts with non-affiliates or more stringent. Last, CMP argues that there is substantial public interest in approving the transactions because it retains Calpine's competitive choice, fulfills the competitive policy adopted by the Commission, and serves the public interest by furthering a beneficial electric generation project.

D. Maritimes & Northeast Pipeline, L.L.C.

MNE states that it advocates a policy in which inter-affiliate transactions do not give the utility's affiliate an unfair competitive advantage and urges us to conduct a broader proceeding to ensure equal access to, and wise use of utility corridors to benefit the development of Maine's emerging competitive natural gas market. MNE urges us to conduct a careful review of the reasonableness of the price paid by CMP's affiliate and recommends that we reaffirm the principle expressed in previous rulings that "transactions between affiliates should be conducted at arms-length to ensure fairness and *the appearance of fairness* to all parties." MNE Brief at 2.

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<sup>3</sup> CMP and CMPNG filed a "Joint Statement of Facts" along with separate briefs. Northern is correct that the "Joint Statement of Facts" contains argument and thus is, in essence, a joint brief. Because they presented a consolidated position on some issues and their positions on their joint application are otherwise generally similar, we report them here together.

E. Bangor Gas Company, L.L.C.

Similarly, Bangor Gas supports "fair and open access to CMP corridors by non-affiliated entities" and takes no position on the merits of Northern's allegations in this case. Bangor Gas notes that the Assessment Agreement does allow for the provision of services so that when executed between affiliates, it does require approval. However, Bangor Gas suggests that, because of the standard nature of the document, that the Commission consider exempting an approved standard form agreement from further review and approval pursuant to 35-A M.R.S.A. §707(C) or perhaps delegating the reviews to staff.

Finally, Bangor Gas comments on the need for section 1101 approval noting that a recent amendment to section 1101(4), exempts transactions involving utility property that do not materially affect the ability of a utility to perform its duties to the public. Bangor Gas suggests that a responsible utility would not permit use of its corridors in such a way, so the Commission could, by rule or order, certify that such transactions not require authorization. The Commission could require the utility to file notification of the property use with a sworn certification the use does not materially affect the ability of the utility to perform its duties.

## VI. ANALYSIS

In its brief, MNE refers to our previous ruling which states

We remind the Company that transactions with affiliates should be conducted at arms length to ensure fairness and the appearance of fairness to all parties.

See *Central Maine Power Co., Petition for Approval of Affiliated Interest Transaction with Union Water Power Company for Underground Facilities Location Services, Dkt. No. 97-165, Order (Apr. 15, 1997)*. MNE emphasizes that the appearance of fairness to all parties is of key importance to affiliate transactions. It takes on renewed importance in the context of an emerging competitive industry such as is currently the case with natural gas supply in Maine. With this in mind we turn to the question of whether this transaction was a fair, arms length transaction that gives the appearance of fairness.

This case presents three principal questions for analysis: (1) Was the price CMP charged CMPNG reasonable? (2) Did CMP treat CMPNG in the same manner it would have treated a non-affiliate? and (3) If not, did the preferential treatment of CMPNG result in harm to the public interest generally or to Northern Utilities in particular?

A. The Price of the Right-of-way

The price charged by CMP for sale of the right-of-way to CMPNG is important for two reasons. First, if the price CMP charged is too low then beginning at the time of the next rate case, the overall rates charged to CMP's electric customers will be correspondingly too high. Second, and equally important in a case where preferential treatment is alleged, an unreasonably low price or an unusually lax attitude toward negotiating a higher price could reasonably be taken to suggest that there was, in fact, preferential treatment.

Chad Clark was the CMP project manager for the Calpine lateral until June 1999 when he left CMP to work for E/Pro, a now unaffiliated engineering and consulting firm established by a group of employees who previously worked for CMP. At E/Pro, he continued to provide services as a consultant to CMP with regard to the lateral. Mr. Clark testified,

I became aware of (CMPNG's) budgeted amount (from) a conversation I had with (CMPNG vice-president) Darrell Quimby directly ... which was sometime probably before March 1<sup>st</sup> when we initiated the kind of a formal process. ... As I recall it, the discussion was along the lines of he was thinking in terms of what he thought was comparable to what had been done on the other pipelines with CMP and the amount was – that he had planned on was about \$ \_\_\_\_\_ per mile as being the ballpark of what he was thinking about.

Tr. C-200-201.

The ROW sale agreements before us were executed October 12, 1999 and cover a right-of-way of 1.86 miles. CMP charged CMPNG a price of \$ \_\_\_\_\_, precisely the ballpark figure that Mr. Clark understood to be the budget of CMP's affiliate, CMPNG.<sup>4</sup> The fact that CMP charged CMPNG precisely its budgeted amount for the right-of-way does not, in itself, imply that the price was unreasonable or that preferential treatment occurred. It does, however, suggest that we consider the reasonableness of the price more fully.

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<sup>4</sup> Mr. Quimby subsequently testified that he mentioned this figure not as CMPNG's budget, but as a figure to be used in helping one of CMPNG's alliance partners, Cianbro, to prepare its own bid to construct the Calpine lateral. Mr. Quimby went on to testify that he did not tell Mr. Clark or others at CMP that he was inquiring on behalf of Cianbro and that it would have been reasonable for them to have concluded that the figure was, in fact, CMPNG's budgeted amount.

CMP justifies the price by comparison to the prices it received for other recent rights-of-way sales to natural gas pipelines. Of course, such comparisons must take into account various differences among the transactions. For example, Mr. Kenneth Freye, the Manager of CMP's Property Management Department, testified that he also considered the completeness of the rights granted, the width and length of the easement, the size of the pipe, the amount of clearing needed, and the value of abutting land. These attributes are reasonable considerations in determining the value of the easement, although difficult to quantify. Other relevant considerations, CMP's selling costs and the extent to which CMP would be reimbursed for its inspector costs, are easier to quantify.

CMP compares this right-of-way sale to three other transactions involving sales of its electric corridor property rights to natural gas pipelines: 1) the MNE pipeline (extending from South Portland north to New Brunswick); 2) PNGTS (extending from South Portland west to Quebec); and, 3) the Joint MNE/PNGTS Facilities (extending from South Portland south to New Hampshire). Of these three, the PNGTS sale price was substantially lower because CMP did not own full property rights for a significant portion of the distance (i.e. CMP owned an easement rather than property in fee.) Confidential Table 1 below shows the average prices per mile for these other ROW sales, net of selling costs and unreimbursed inspector costs.

Table 1 [CONFIDENTIAL]

M&NE	\$	per mile
PNGTS		
Joint MNE & PNGTS		
CMPNG		

For the CMPNG sale, the original price of \$            per mile is before selling costs. Net of selling and inspector costs, the CMPNG transaction proceeds were \$            per mile, or % to % below the prices for MNE and the Joint Facilities transactions.

In fact, the actual proceeds from the CMPNG transaction were even lower. In addition to selling expense, CMP also incurred unreimbursed costs to buy additional land and/or land rights and significant regulatory expenses to litigate this proceeding. In fact, after netting out these expenses, CMP will only received \$            to \$            from this transaction or about \$            to \$            thousand per mile, depending on the final lack of regulatory expenses. Thus, the net proceeds of this deal to CMP are very low, the lowest of the four sales.

Having performed these calculations, we should point that they require careful interpretation. For example, if CMP had not made the additional land purchases, the value of the ROW to CMPNG would be lower thereby reducing, perhaps, the price CMP might receive. In addition, the regulatory expenses in this case have undoubtedly been unusually high. However, since the contract was not signed until

October, after the issue of service to Calpine had become extremely litigious, CMP should have reasonably expected significant regulatory expense and could have attempted to recover these costs through the sale price.

The other considerations Mr. Freye mentions generally offset one another. The other ROWs were 40 to 50 feet wide and carry pipes of 12 to 30 inches while the CMPNG right-of-way is 20 feet wide and will carry a 12-inch diameter pipe, which could tend to justify a lower price. On the other hand, Mr. Freye testified that the additional costs to clear on this ROW were relatively low, and that the value of abutting land was relatively high, both of which tend to push up the value of this ROW.

This analysis suggests that the price CMP requested and received for the ROW was relatively low. The record also indicates that CMP was not particularly aggressive in placing itself in a position to bargain for a higher price. In particular, in accepting Mr. Quimby's suggestion that the value for this ROW should be set based on the price received for other the other easements, CMP apparently chose not to consider some of the reasons this specific right-of-way might be particularly valuable.

For example, the other three ROW's are relatively long and provide essentially a common carrier function, delivering gas to multiple buyers and competing against other pipelines that provide a similar service. However, this ROW will be used by a dedicated lateral delivering gas to a single large electric generator. It is not clear that the value of ROW's for these two purposes would be the same.

In Maine and New England, there are a number of new gas-fired generation plants in various stages of planning and construction. Based on our general knowledge of these plants, they are often located in areas that are in close proximity to both gas pipelines and the existing electric transmission grid, particularly Pool Transmission Facilities (PTF).<sup>5</sup> This suggests that ROW's located near the intersection of existing electric transmission lines and gas pipelines may be particularly valuable.

According to a data response, CMP accepts the general premise that easements on these corridors may be more valuable.

CMP believes transmission line corridors near natural gas transmission line corridors may be more valuable than other corridors not so situated, but only if a gas pipeline company or other entity wants to install a gas pipeline and there is sufficient room and rights to allow such installation. When these conditions exist, electric transmission lines may offer a lower cost alternative to creating a new corridor across

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<sup>5</sup> PTF transmission is the high voltage backbone of the New England transmission grid. It is generally advantageous for new generators to interconnect directly to the PTF system to avoid paying local transmission charges in addition to any PTF related charges.

individual landowners. When a gas pipeline company, or other entity, desires to use CMP's corridors, CMP may be able to charge a price based on the alternatives to using the corridor.

ADV-01-02.

Even though CMP believed that this ROW may have been more valuable due to its location, it apparently did not take this into account in determining the price. Similarly, while CMP also believes that the price could be increased to reflect the costs of the buyers' alternatives, "CMP did not consider CMPNG's alternative routes" or the cost of alternative routes. ADV-03-05.

Another approach CMP might have taken would have been to determine whether other companies, such as Northern, might have been interested in the same property in an effort to bid up the price that CMP might receive. We will discuss CMP's dealings with Northern in a later section of this Order. For this purpose, we simply note that CMP chose not to take any steps to encourage a bid from Northern, or any other competitor, for the same ROW.

In conclusion, the price CMP charged CMPNG does not represent a reasonable price. After taking into account CMP's transaction costs, the net proceeds are far below the comparable proceeds for the easements where CMP granted the buyer full easement rights. Furthermore, plausible arguments can be made that this right-of-way is more valuable than the others, although CMP apparently did not develop or pursue those arguments in negotiations with CMPNG. Rather, CMP accepted the "initial" "budget" figure thrown out by CMPNG and limited itself to considering only CMPNG's rationale that this ROW should be valued solely by reference to the price of the other two ROW sales.

Finally, under 35-A M.R.S.A. §707 (3) (G) we are required to determine the value of the right-of-way. This record does not contain evidence of the market value beyond those details reported above. Thus, establishing a value for this easement requires us to exercise our judgment given the information we have.

The \_\_\_\_\_ transaction net proceeds of \$ \_\_\_\_\_ per mile is the lowest value CMP received for the right-of-ways where CMP held most or all of the property in fee. We believe the CMPNG easement should have been priced to produce similar net proceeds. However, because the regulatory expenses were relatively high and partially outside CMP's control, we will only charge \$ \_\_\_\_\_ of the estimated \$ \_\_\_\_\_ to \$ \_\_\_\_\_ against the net proceeds. In addition, we will not charge the land purchases against net proceeds on the theory that the without the land purchases,

CMP's proceeds would likely have been lower. On this basis, we find the value of the CMPNG right of way to be \$ .<sup>6</sup>

Pursuant to Chapter 820, CMP and CMPNG are required to reform their agreement to reflect this value. This ensures that CMP's ratepayers will not subsidize the affiliate transaction and CMPNG will not obtain a competitive benefit in this transaction.

**B. CMP's Interactions with CMPNG**

Beyond the low price CMP charged CMPNG, there are other suggestions of a much closer relationship between CMP and CMPNG than one would expect for non-affiliated firms.

During Mr. Clark's tenure as CMP's project manager for the Calpine lateral, he and Mr. Quimby of CMPNG had adjoining offices on the fourth floor of CMP's corporate headquarters on Edison Drive. These offices were only separated by movable partitions rather than permanent walls. Apparently, from time to time they would communicate with one another by speaking over the partitions. Tr. C-295. Also, depending on the level of ambient noise it was possible for someone in one office to listen to a conversation in the other. Tr. C-310.

Mr. Clark testified that he was careful not to discuss sensitive issues such as CMP's pricing strategy for the Calpine lateral if he thought Mr. Quimby might be able to overhear the conversation. However, it remains troubling that CMP's lead person in negotiating the easement agreement with CMPNG would have an office which was not only adjacent to the office of a CMPNG officer directly involved in the same negotiations but that he could not even be certain that conversations in his own office would be confidential.

Furthermore, Mr. Quimby testified that in addition to his duties for CMPNG, he also spends a portion of his time working as a strategic planner for CMP Group keeping track of changes in the electricity and energy industries. Tr. C-317. CMP is a wholly-owned subsidiary and CMPNG is a partially-owned subsidiary of CMP Group. Presumably Mr. Quimby's work is valuable to CMP Group because it informs decisions which CMP Group and/or CMP might make regarding the strategic planning of CMP, CMP Group's primary operating company and only electric utility. In such circumstances, it might be difficult for Mr. Clark, or other CMP employees involved with negotiating the Calpine ROW to consider Mr. Quimby with the same sense of independence that they might view, say, Mr. Cote of Northern when he inquired about CMP's policies on allowing an unaffiliated LDC and competitor of CMPNG use of CMP land.

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<sup>6</sup> In other words, the value is calculated as 1.86 miles at \$ per mile plus selling expenses of \$ plus regulatory expenses of \$ .

It is difficult for any outsider to get a clear picture of the full range of interactions between two affiliated companies, particularly where they have both formal and informal contacts on a daily basis. However, other recent instances further reveal the actual relationship between these two firms.

On September 24, 1999 in Docket No. 99-477, Arthur Adelberg, Executive Vice President of CMP Group wrote a letter to the Commissioners individually expressing a number of opinions, particularly his concern that Northern was using the CMPNG certificate proceeding<sup>7</sup> to "drive CMP Natural Gas from the market." While the merits of Mr. Adelberg's arguments are of little relevance here, the fact that he both spoke in CMPNG's defense and enlisted the help of Mr. A. Lawrence Ralph, a Senior Counsel at CMP, to assist in drafting the letter is relevant. Mr. Ralph was the legal counsel representing CMP in negotiating the contract with CMPNG.<sup>8</sup> The message to Mr. Ralph, that senior management at CMP Group had a strong interest in CMPNG serving Calpine, must have been quite clear.<sup>9</sup>

Another incident that places into question the independence of these affiliates occurred during June 1999 while the affiliates were negotiating the ROW sale, when Mr. Kelley of CMPNG reviewed his project budget (including the amount CMPNG proposed to pay CMP for the ROW) with Mr. Adelberg, an officer of the parent corporation for both CMP and CMPNG.

Finally, on November 24, 1999, CMP and CMPNG filed for approval of an Easement Agreement under which CMPNG would build a metering and regulation station on land owned by CMP.<sup>10</sup> While this transaction is currently under review in a separate docket, it is of note here because it is apparent from the filing that CMP allowed CMPNG to construct the facility prior to either reaching final agreement with CMPNG over the use of the property or obtaining Commission approval. While CMP states in the application that this was merely an oversight, it is difficult to believe that any non-affiliate, such as Northern, would have been allowed to construct a similar facility without first negotiating and signing a contract that granted it rights to do so.<sup>11</sup>

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<sup>7</sup> *CMP Natural Gas, L.L.C., Petition for Approval to Furnish Gas Service in the Municipalities of Westbrook and Gorham, Docket No. 99-477.*

<sup>8</sup> Mr. Ralph's office is also on the fourth floor of the Edison Drive building in the same vicinity as the offices of Mr. Quimby and Mr. Clark (until he left CMP).

<sup>9</sup> Paradoxically, Mr. Adelberg's letter also strongly argued that CMP and CMPNG were independent companies and criticized Staff for inappropriately blending their identities by issuing a data request to CMP which was not party in Docket No. 99-477.

<sup>10</sup> *Central Maine Power Company and CMP Natural Gas, L.L.C., Application for Approval of Affiliated Interest Transaction for Windham M&R Station, Docket No. 99-846.*

<sup>11</sup> When the contract was ultimately negotiated, it specified a price of \$2,000 as compensation to CMP for construction of a 1,900 square foot building on their property.



To summarize, while any of the above-described incidents, when viewed individually, may not necessarily show preferential treatment, taken as a whole, they are evidence of a pattern of preferential behavior. CMP and CMPNG do not behave as separate independent entities; there is a pattern of preferential treatment.

C. Harm to Northern and to the Public Interest

The price terms of this proposed agreement and the series of events cited above suggest that CMP does not treat CMPNG in the same way it would treat non-affiliates. Utility actions in preference to its affiliate in providing access to utility facilities are forbidden by Chapter 820(8)(C). However, the fact that preferential treatment has occurred, does not necessarily imply that any actual harm occurred in this instance.

Northern has argued throughout this proceeding and Docket No. 99-477 that it was harmed, that but for CMP's preferential treatment of its affiliate, it (or one of its affiliated companies) would have been awarded the contract with Calpine and been granted an easement to build a lateral along the corridor.

There has been extensive evidence of Northern's pursuit of the Calpine contract both in Docket No. 99-477 and in the depositions of Mr. Petit who represented Calpine in its negotiations over the lateral and of Mr. Flumerfelt who worked for and on behalf of Northern and its affiliates (the Bay State family of companies, i.e. Northern, Granite State, PNGTS, and Bay State Gas Company, an LDC serving Massachusetts.) In his efforts on behalf of Calpine to have the lateral constructed, Mr. Petit made a conscious decision to solicit as much viable interest in competing for that project as possible. Mr. Petit testified that he solicited a proposal from the Bay State family of companies on more than one occasion but that Northern/Granite State<sup>12</sup> indicated that it did not have the internal resources to develop a detailed proposal and asked Calpine to fund the development of such a proposal. After Calpine declined, Granite State finally did submit a proposal that Mr. Petit characterized as not comprehensive or well advanced.<sup>13</sup>

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While the reasonableness of this price is before us in Docket No. 99-846, one might reasonably question whether it is too low.

<sup>12</sup> Because we are the proper forum for a complaint regarding CMP's ROW practices, and because most of the individuals who prepared the Calpine bid worked on behalf of both Northern and Granite (i.e. Messrs. DaFonte, Simpson, MacDonald, and Flumerfelt), we will consider Northern's arguments applicable to both Granite and Northern. Further references to Northern in this report are intended to include Granite by implication.

<sup>13</sup> PNGTS submitted a proposal on its own behalf independent of Northern or Granite State. Deposition of Mr. Petit at 82-86. PNGTS has not intervened in this proceeding and the evidence does not suggest that it felt disadvantaged in any way by the events about which Northern complains.

Thus, it appears clear that the primary reason Northern failed to win the Calpine lateral contract was that its management did not act aggressively to pursue the lateral project. Beyond that, the Bay State family was not able to convince Mr. Petit that any of its affiliates was the best choice for Calpine. Moreover, according to Mr. Petit, if he had not selected CMPNG for the Calpine contract, he would have awarded the contract to a bidder other than Northern or its affiliates. Petit Dep. at 62-63.

Northern next claims that CMP discouraged them from trying to obtain access to the ROW. In fact, there appear to have been problems on both ends. As we have indicated earlier, it would have been in CMP's interest to work with Northern in making clear the process for obtaining an easement to use this or other CMP properties. CMP could have, and should have, made some effort to encourage interest in their property. On the other hand, a single desultory inquiry by Mr. Cote of Northern to Mr. Grover of CMP can hardly be the basis for concluding that CMP would not, in fact, have allowed Northern an easement for this particular ROW. If, as Northern asserts, Mr. Cote believed that CMP was asking for an unreasonable amount of information, he could have made at least some effort to get this pared back to a reasonable level.

We recognize that Northern may have held a pessimistic and wary mindset as a result of their knowledge of PNGTS's difficulties attempting to negotiate access to CMP's corridors. We also recognize that its pessimism may have been compounded by the fact that CMP is closely affiliated with Northern's vigorous competitor, CMPNG. It is understandable in that context that Northern would feel it necessary to proceed cautiously, keeping from CMP the location of the ROW in which it was interested when it did not appear it could gain access to the corridor in a meaningful period of time.

The communication between Northern's Cote and CMP's Grover clearly reveals the restraint and caution that each party felt in addressing the other about the availability of the Calpine ROW.<sup>14</sup> While each party's perspectives were valid to some degree, it is unfortunate that these concerns appear to have resulted in a failed effort to fully address the question of Northern's likely access to the Calpine corridor.

Still, on balance we cannot find that CMP's actions were intended to discourage Northern's use of its ROW. Nor can we conclude, based on the evidence surrounding that single telephone call, that Northern made a sufficiently direct effort to prompt CMP to undertake a more active response. Rather, Northern's effort here appears quite similar to its equivocal pursuit of the Calpine contract itself. We can only

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<sup>14</sup> Mr. Grover presumed that Northern was very likely considering use of CMP's ROW in Westbrook to serve Calpine but did not confirm this with Mr. Cote. CMP might have been leary of an overt request by Northern about use of the Calpine corridor since it would compete with CMP's affiliate's interest in the property.

conclude that, while Northern may have been justifiably wary of the possibility of loyalty and preferential treatment by CMP of its affiliate CMPNG, given its own managerial actions, Northern was not actually harmed by preferential treatment between these affiliates in this instance.<sup>15</sup>

Nor is there evidence that the competitive process was adversely affected by the affiliate dealings between CMP and CMPNG. No other bidder or entity has come forth to allege harm from inappropriate affiliate dealings between CMP and CMPNG in the course of this competition. CMP ratepayers are protected by the provisions of Chapter 820 and CMPNG will not incur an inappropriate competitive benefit from this transaction.

We have a general preference for market as opposed to regulatory solutions. However, we are cognizant of the need for intervention to ensure that public utilities do not act in a manner that impedes the market function. We are persuaded by the evidence of the affiliate dealings surrounding this transaction that these dealings did not result in unfairness with regard to the competitive process or impact its result with regard to Northern in this instance.

Moreover, using our regulatory authority to put Northern in a better position than their competitive actions merit or to unnecessarily jeopardize the timely provision of service to Calpine would defeat the purpose of our public interest oversight. Regulatory remedies should be reserved for instances of actual harm or to reverse practices which clearly contravene the public interest. Our forum should not provide incentives to divert or distort legitimate competitive market workings.<sup>16</sup>

Accordingly, we find that the proposed transaction between CMP and CMPNG is not adverse to the public interest if based on market value.

Clearly, the pattern of affiliate behavior we have identified raises serious concerns with regard to whether it conveys the appearance of fairness as well as fairness. We have clearly stated our policy of encouraging competition among gas LDC's in the large portion of the state where natural gas distribution service does not currently exist. For this policy to work effectively all competitors and potential

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<sup>15</sup> These include: the low degree of interest senior management had in the lateral project due to its relatively small profit expectations; decision not to authorize funds to complete an engineering study; decision to file the proposal on behalf of Granite, not Northern; filed proposal late and did not meet Calpine's criteria; evidence that Northern had sufficient information to prepare a bid without access to CMP's ROW or other information from CMP and that potential routes did not play a significant role in the bid price.

<sup>16</sup> We can only wonder whether, had the Bay State family invested as much effort and resources in developing a detailed bid to serve Calpine or pursuing the ROW as it has in litigating this case, it would have won the contract to serve Calpine.

competitors need reasonable assurance that they have equal ability to use existing rights of way to site new gas facilities. In fact, in addition to Northern, both Bangor Gas and MNE have participated in this case based on a general concern over fair and equal access to electric corridors.

The behavior of CMP and CMPNG convinces us that there is a clear need to strengthen the separation between CMP and CMPNG, particularly over the availability of CMP property and information to CMPNG. However, our concerns about the close working relationship of the affiliates can be effectively addressed on a going-forward basis to ensure that problems do not arise in the future, but we believe the problems are serious enough to warrant immediate action.

Our existing rule governing affiliated interest transactions, Chapter 820, prohibits preferential treatment by the utility of its affiliate. It also requires that information provided to an affiliate be provided to non-affiliated companies on request. It does not provide specific requirements for separation between the utility and its affiliate as set forth in section 3205 of Title 35-A and Chapter 304 of our rules. Therefore, Chapter 820 may currently be inadequate to deal with the situations such as this where a utility has such direct involvement in one aspect of the competition between one of its affiliates and other unaffiliated companies.

Chapter 304 of our Rules, "Standards of Conduct for Transmission and Distribution Utilities and Affiliated Competitive Electricity Providers," provides the closest measure of appropriate competitive behavior for utilities, but because it is limited to competitive electric suppliers and their transmission and distribution affiliates, it is not directly applicable to this situation.

Ultimately, we will need to consider whether Chapter 820 should be modified to include provisions similar to those existing in Chapter 304. However, evidence of preferential treatment in this case indicates a need to impose additional standards of conduct that we determine are necessary to protect the public interest. Thus, we require CMP and CMPNG to conform to certain portions of Chapter 304 to provide necessary competitive safeguards, as follows:

- Section 3, Standards of Conduct<sup>17</sup>;
- Section 5, Implementation Plan;
- Section 6, Audits;
- Section 7 Sanctions<sup>18</sup>; and
- Section 9, Waiver or Exemption of Chapter 304.

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<sup>17</sup> Section H, Log of information Requests, Section I (5), Commission maintenance of a list of competitive providers are irrelevant and can be ignored. In addition, Section I (6) items (a) and (c) appear irrelevant.

<sup>18</sup> Section B is irrelevant and can be ignored.

We have consolidated and attached the applicable provisions to this Report as Appendix B. This requirement will remain in place until lifted by the Commission.

## **VII. SECTION 1101 AUTHORITY FOR SALE OF UTILITY PROPERTY**

CMP witness Lee Blake described the CMP corridor on which facilities to serve the Calpine facility are proposed to be located as a "critical" corridor. This means that it is one of a limited number of routes to provide additional electric transmission facilities to serve the growing electric load of the southern Maine region. This fact suggests that it is critical to review whether CMP can reasonably sell a portion of the easement to locate a gas pipeline without impacting its future plans and the public necessity for use of this corridor for electric facilities. Mr. Blake testified that the placement of the gas pipeline allows CMP room for an additional 115 Kwh transmission line that should be adequate for CMP's future needs. No party contested this assertion. Consequently, we approve the sale of this portion of the ROW pursuant to §1101.

## **VIII. ASSESSMENT AGREEMENTS**

In our December 13<sup>th</sup> Order in this proceeding, we found that the Assessment Agreement between CMP and CMPNG executed in October 1998 and its amendments constitute arrangements between affiliates for the provision of services and require our approval pursuant to 35-A M.R.S.A. §707(3). December 13<sup>th</sup> Order at 30. We further stated that we saw no justification as to why either or both utilities did not file the Agreements with us for review and approval and directed the Hearing Examiner to issue an order requiring CMP and CMPNG to show cause why they should not be subject to sanctions for this omission.<sup>19</sup> We also directed parties to pursue further in this case the question whether it may have been a tactical decision on CMP and/or CMPNG's part not to do so.

CMP's Supplemental and Second Supplemental Prefiled Direct Testimonies of Mr. Kenneth H. Freye describe the Assessment Agreement generally and the process leading to entering such agreements. Freye explains the basic nature of the Assessment Agreement as primarily a vehicle to release and indemnify CMP and to provide that CMP will be reimbursed for costs it incurs. CMP's participation in the evaluation of projects proposed for its corridors is to ensure that another entity's proposed use of the electric corridor would not adversely impact CMP's present and future use of the corridor for electric purposes. CMP requires that all entities, whether affiliated or not, to execute such an agreement prior to detailed investigation of its corridors.

CMP argues that the agreements do not require CMP to perform services for pipeline companies, but rather ensure that if CMP chooses to provide advice or perform

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<sup>19</sup> In Docket No. 99-477, Northern alleged that the affiliates' failure to file these agreements constituted conscious, anti-competitive behavior.

analysis, its costs will be recovered from the entity seeking to use the corridor. Consequently, Mr. Freye testifies that he did not believe the agreements required Commission approval pursuant to section 707.<sup>20</sup>

Northern alleges that, had CMP and CMPNG submitted the initial Assessment Agreement for approval when it was first executed, Northern would have been aware of this means of gaining information about and access to CMP's corridors. Northern argues that this information would have placed it on equal footing because it could then have sought a similar arrangement with CMP. Northern further asserted that it was a tactical decision on the CMP Group affiliates' part not to reveal the existence of the agreement in order not to inform competitors of CMPNG's potential projects along CMP's corridors.

A. Analysis

CMP's explanation of the function and nature of the Assessment Agreement may help explain why it apparently did not recognize the need to file such agreements, when executed between affiliates, for our approval. However, the statutory language outlining when agreements between affiliates require prior review is broad.

No public utility may make ... any contract or arrangement for the furnishing of management, supervision of construction, engineering, accounting, legal, financial or similar services, or for the furnishing of any service or real or personal property with any affiliated interest other than those enumerated until the commission finds that the contract or arrangement is not adverse to the public interest and gives the contract or arrangement its written approval.

35-A M.R.S.A. § 707(3) (emphasis added.) CMP argues that the Agreements are not contracts for services but rather are simply arrangements that allow CMP to recover the costs of any work it does to monitor and analyze proposed projects on its corridors.

The Assessment Agreement contains the following language:

1. DESCRIPTION/WORK/SUPPORT

C. SUPPORT is defined as CMP's efforts to support CMPNG in their efforts to assess the CORRIDOR for use of the pipeline. SUPPORT includes CMP labor and expense in reviewing potential PIPELINE alignments within and uses of the CORRIDOR regarding operations, maintenance,

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<sup>20</sup> The initial Assessment Agreement executed October 1998 sets out the terms in detail whereas the April 1999 amendment simply extends the arrangement to additional ROW locations.

environmental, survey, real estate issues, and associated project management, as well as investigating potential conflicts with other potential uses of the CORRIDOR. SUPPORT includes the cost to copy and transmit drawings and other information requested. SUPPORT also includes adequate field representation from CMP to protect its interests during any time CMPNG or its contractors are physically within the CORRIDOR. In addition, SUPPORT will include a CMP-hired consultant to assist in evaluating technical issues associated with mutual use of the CORRIDOR, including cathodic protection and A.C. mitigation.

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#### 8. REIMBURSEMENTS

CMPNG will reimburse CMP for Support costs reasonably expended, as identified in section 1C... CMP will submit a monthly bill for CMPNG...

We do not find that the language of the Assessment Agreement contains a limitation to work that CMP decides, "in its sole discretion," is in its interest to perform. See Second Supp. Test. Freye at 2-3. Moreover, while CMP asserts that the support that it provides is of a technical nature designed to ensure that the electric uses of the corridor are not impaired, this exchange of information and supporting analysis also benefits the entity seeking to use the corridor by assisting it in developing the details of its pipeline location and specifications. The very term "support" implies active assistance, rather than passive or defensive analysis.

Consequently, we believe that an Assessment Agreement between affiliates falls within the statutory framework because it essentially constitutes an arrangement whereby CMP will provide technical and some degree of project management services to the affiliate for compensation. Having so concluded, however, we acknowledge that these agreements are likely to be susceptible to a largely standard form. Consequently, we find Bangor Gas's suggestion that approval could be done quickly through delegation to staff or by conformance to a Standard Form Assessment Agreement useful. We also do not believe that prior approval is necessary for amendments of the agreement that only modify the locations and/or extend the time period of the underlying agreement. Because these types of amendments do not alter the underlying support service agreement, they would not require our approval under section 707(3).

Finally, we will address Northern's contention that it was harmed in this competitive situation by CMP's and CMPNG's failure to file their original Assessment Agreement executed October 1998 and its April 1999 amendment for our approval.

Northern's and Granite State's representative in developing the bid for the Calpine project, Mr. Flumerfelt, was familiar with CMP's use of Assessment Agreements generally to allow an entity to evaluate the use of its corridors for natural gas facilities.<sup>21</sup> However, he may not have been aware that CMPNG had entered into an Assessment Agreement for certain corridors (and eventually this corridor). Moreover, consistent with the treatment accorded to these agreements in Docket No. 99-477, in this competitive environment, the specific locations to which the agreements apply warrants confidential treatment. In that regard, Northern would not have been entitled to know through regulatory means what CMP corridors CMPNG was evaluating, only the terms of the affiliate's access and the fact that the affiliates had such an agreement in place.

More importantly, the record indicates that all competitors -- including Northern according to Mr. Flumerfelt -- were able to prepare and submit viable bids for the Calpine lateral without obtaining access to, or specific information about, CMP's corridors. Also it appears that CMPNG did not benefit from the amended Assessment Agreement during the bidding process because it did not execute the amendment until April 22, 1999, or enter the corridor, until after bids had been submitted to Calpine.<sup>22</sup> We conclude that the omission of regulatory approval did not harm Northern in its efforts to compete for the Calpine project and find no basis on this record to find that CMP and CMPNG avoided regulatory review of these agreements as a means of anti-competitive strategy. Thus, we see no competitive disadvantage to Northern from CMP and CMPNG's omission from obtaining regulatory approval in October 1998.<sup>23</sup>

We also do not find persuasive evidence that CMP and CMPNG intended to mislead competitors and decided not to bring the Agreements to us for section 707 approval in willful violation of the statute and as anti-competitive strategy. CMP's explanation that it viewed Assessment Agreements not as contracts for services, but rather as a vehicle for indemnification and reimbursement, is a plausible enough interpretation of the purpose of the Agreement to excuse the omission.

We further note that erring on the side of caution in such matters will save CMP Group resources and build good will through conformance with regulatory requirements aimed at protecting both competitors and the public trust and by projecting

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<sup>21</sup> It is possible that Mr. Cote, Mr. DaFonte, and Northern's counsel were unaware of the existence of CMP's Assessment Agreements; Mr. Flumerfelt learned of them while working for PNGTS. However, because Mr. Flumerfelt led the Northern/Granite effort in developing the lateral project bid we can safely conclude that he would have made use of his knowledge had it been useful.

<sup>22</sup> CMP and CMPNG witnesses testified that CMPNG did not enter onto CMP's Westbrook corridor prior to executing the Assessment Agreement on April 22, 1999.

<sup>23</sup> The question whether CMPNG unreasonably withheld the Assessment Agreement from Northern during the litigation of Docket No. 99-477 is pending further review in that docket.



a demeanor of openness and fairness. The current mode of operation simply invites distrust and allegations such as those raised by Northern.

## **IX. CONCLUSION**

We approve the proposed agreements between CMP and CMPNG for sale of and use of portions of CMP's electric corridor located in Westbrook and necessary to serve the Calpine electric generation facility pursuant to 35-A M.R.S.A. §§ 707 and 1101, at the market value we have identified for this transaction.

We order these CMP Group affiliates to conform with the provisions of Chapter 304 outlined above and contained in Appendix B hereto. We will initiate a rulemaking on standards of conduct for affiliates in a competitive market and will consider whether tariffed access to and use of electric corridors is in the public interest.

Respectfully submitted,

Carol A. MacLennan  
Hearing Examiner

Assisted by:  
Thomas Austin  
Denis Bergeron  
Gary Farmer  
and  
Lucretia Smith,  
Advisory Staff

## APPENDIX A: PROCEDURAL HISTORY

On October 22, 1999, Central Maine Power Company (CMP) and CMP Natural Gas, L.L.C. (CMPNG) filed a joint application seeking approval pursuant to 35-A M.R.S.A. §§ 707 and 1101 of five agreements involved in an affiliated transaction for access, use and sale of easement rights and related matters. These agreements include: 1) CMP Closing Agreement; 2) CMP Grant of Easement and Consent; 3) CMP/CMPNG Right-of-way Use Agreement; 4) CMP Access License; and 5) CMP Maintenance Agreement. The filing also contained the pre-filed direct testimony of Kenneth Freye, Manager, Property Management for CMP. Finally, the petitioners filed a construction agreement between CMP and Cianbro Corporation (Cianbro) intended to permit CMPNG, through its contractor, to begin construction of its proposed gas pipeline facilities on the CMP right-of-way that is the subject of this transaction before winter.

On October 28, 1999, the Hearing Examiner issued a Notice of Proceeding and established a deadline for intervention in this case of November 8, 1999. Because of the interrelated nature of the cases and the urgency of the petitioners' request to be allowed to begin construction before winter, the Notice also invited the parties to Docket No. 99-477 to file comments on the petitioners' construction agreement. The OPA, Northern, MNE, and Bangor Gas filed comments objecting to allowing Cianbro to engage in construction on CMP's right-of-way on CMPNG's behalf as improperly circumventing regulatory review.<sup>24</sup>

On November 15, 1999, the Commission deliberated the proposed construction agreement and denied the request for an exemption from section 707 review to permit Cianbro to commence construction before resolution of this proceeding.

The Hearing Examiner issued a procedural order on November 16, 1999, outlining several matters for discussion at the initial case conference, including whether Docket Nos. 99-739 and 99-477 should be consolidated, the scope of issues included in Docket No. 99-739, and setting an initial discovery schedule. An initial case conference was held on November 17, 1999 at which the interventions of OPA, MNE, Northern, and BGC were granted. The City of Westbrook filed a late-filed petition to intervene on November 17, 1999. Westbrook's limited intervention was allowed by Procedural Order dated December 16, 1999.

The Hearing Examiner issued a Summary of Initial Case Conference on November 23, 1999 providing the rulings made at the initial case conference and setting certain matters, such as confidential treatment, for comment.

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<sup>24</sup> The Commission had not yet authorized CMPNG to serve the Calpine facility. Commission deliberated CMPNG's request for authority to serve Calpine's facility in Westbrook in Docket No. 99-477 on November 15-16, 1999.

On November 24, 1999, CMPNG filed a Request for Expedited Reconsideration of the Commission's decision to deny its request for preliminary approval to allow early winter construction of the natural gas pipeline facilities to serve Calpine. On November 29, 1999, the Commission issued a procedural order inviting comments by December 1 and setting a December 2 telephone conference with representatives of Calpine Eastern and participating Maine environmental agencies. Messrs. Michael Petit, Director of Fuel Supply, for Calpine Eastern Corporation, Malcolm Jarvis, Project Manager for the Westbrook facility, and John Boland, Regional Fisheries Biologist, Department of Inland Fisheries and Wildlife participated in the conference and answered questions regarding the necessity and impact of beginning construction immediately. The Commission deliberated this matter on December 3, 1999 and issued its Order (Part 1) granting CMPNG authority to begin limited construction activities on CMP's electric corridor.

On December 8, 1999, the Hearing Examiner issued Temporary Protective Order No. 2 (governing sensitive business information produced by CMP) and Temporary Protective Order No. 3 (governing NEPOOL electric transmission information) but required CMP to provide additional comment and justification for the extent of protective treatment accorded this information.

On December 13, 1999, the Commission issued an Order in both Docket No. 99-477 and in this case, Docket No. 99-739, granting CMPNG authority to serve the Calpine Corporation electric generation facility in Westbrook and to provide general natural gas service within the municipality of Gorham. *CMP Natural Gas, L.L.C., Petition for Approval to Furnish Gas Service in the Municipalities of Westbrook and Gorham (§2105) and Central Maine Power Company and CMP Natural Gas, L.L.C., Request for Approval of Affiliated Interest Transaction, Sale of Assets (Property)*, Order (Dec. 13, 1999) (December 13<sup>th</sup> Order).

On December 16, 1999, the Hearing Examiner adopted a schedule for Docket No. 99-739 that included a comprehensive 1-day hearing to investigate the dealings between CMP and CMPNG or any other entity for use of and sale of the electric right-of-ways to serve the Calpine facility.

On December 20, 1999, the Commission suspended the effective date of the agreements subject to review in this proceeding for an additional 60 days.

Also on December 20, 1999, the Commission deliberated CMP's appeal of the Hearing Examiner's Temporary Protective Order No. 2. The Commission ruled that the unique competitive circumstances warranted that sensitive business information would be distributed only to the Commission, OPA and respective staff members unless and until there was a finding by the Hearing Examiner that the information could be released to parties and/or their attorneys. The Hearing Examiner issued Revised Temporary Protective Order No. 2 on December 21, 1999.

On December 22, 1999, CMP filed the Supplemental Testimony of Kenneth H. Freye and the Direct Testimony of Lee J. Blake, Transmission Technical Coordinator for CMP.

The OPA held the depositions of Michael D. Petit, Director of Fuels Supply, and P. Malcolm Jarvis, Project Manager for Westbrook Energy facility, both of Calpine, on December 17 and 28, 1999, respectively. CMP took the deposition of John M. Flumerfelt, a former employee of Northern and its affiliates, Granite State Gas Transmission Company (Granite State), Bay State Gas Company (BSGC) and Portland Natural Gas Transmission System (PNGTS), on December 22, 1999. CMPNG took the deposition of Thomas G. Quine, President of Northstar Industries, on December 21, 1999. Depositions of witnesses for Northern and MNE were cancelled.

On January 3, 2000, CMP filed a Motion for Reconsideration/Clarification of Section 1101 Finding in the Hearing Examiner's December 16, 1999 Procedural Order.

The Commission held a conference of counsel on January 3, 2000. The last round of discovery responses were also submitted on that date. Also on January 3, 2000, the Commission issued its Order (Part II) in Docket Nos. 99-477 and 99-739 resolving scheduling and protective order issues.

The Commission held a hearing on January 5, 2000 at which the following witnesses were cross-examined: Steve Garwood, Managing Director Transmission Operations, CMP; Kenneth Freye, Manager, Property Management for CMP; A. Lawrence Ralph, Senior Staff Attorney, CMP; Lee Blake, Transmission Technical Coordinator, CMP; Stanley Grover, Line Superintendent, T & D Operations, CMP; Chad Clark, E/Pro Engineering and Environmental Consulting, L.L.C. and former Business Development Manager, CMP; Tim Kelley, President, CMPNG; Darrel Quimby, Senior Planner at CMP Group and Vice President of CMPNG; and Gary Kenny, Manager of Engineering and Operations, CMPNG. Advisory Staff questions regarding transaction costs and accounting were deferred and addressed through the exchange of further written information. See Procedural Order – Technical Conference to Determine Net Revenues issued January 6, 2000.

On January 7, 2000, CMP filed a motion to strike certain allegations made by Northern in this proceeding, seeking to obviate the need for briefing those issues. CMPNG filed supporting comments. Northern filed in opposition to CMP's motion. On January 12, 2000, the Hearing Examiner issued an Order Denying Motion to Strike but accepting CMP's motion and CMPNG's filing in support thereof as their briefs on those issues.

On January 12, 2000, the OPA, CMP, and CMPNG jointly filed a stipulation proposed to resolve this proceeding. BGC and MNE take no position on the stipulation. On January 13, 2000, the Hearing Examiner denied the stipulating parties' request to suspend the briefing schedule and stated that the Commission would consider the proposed stipulation along with the merits of this case at its scheduled deliberations.

On January 19, 2000, Northern filed a Motion to Admit as Late Exhibits the responses to Oral Data Responses 01-01, 01-02 and supplemental response to 01-02, and 01-03. Additionally, OPA requests that the response to OPA-02-05 be entered into the record as a late-filed exhibit.

OPA, CMP, CMPNG, Northern, MNE and BGC filed Briefs on January 19, 2000. CMP, CMPNG, and Northern filed Reply Briefs on January 26, 2000.

## APPENDIX B

Exhibit B: Standards Of Conduct for Central Maine Power Company (CMP) in its dealings with CMP Natural Gas (CMPNG).

~~65 - INDEPENDENT AGENCIES - REGULATORY~~

~~—— 407 - PUBLIC UTILITIES COMMISSION~~

~~CHAPTER 304 - STANDARDS OF CONDUCT FOR TRANSMISSION AND  
—— DISTRIBUTION UTILITIES AND AFFILIATED COMPETITIVE  
—— ELECTRICITY PROVIDERS~~

~~SUMMARY — These requirements constitute the Standards of Conduct for Central Maine Power Company (CMP) in its dealings with CMP Natural Gas (CMPNG). They are taken from Chapter 304 of the Commission's Rules and are presented in "legislative" format for the readers' convenience. For purposes of these standards, CMP is analogous to a Distribution Utility under Ch. 304 and CMPNG is analogous to an Affiliated Competitive Provider. This Chapter establishes standards of conduct applicable to both large and small investor-owned distribution utilities and affiliated competitive providers, a method of tracking the retail sales made by an affiliated competitive provider within the service territory of its affiliated distribution utility and a requirement that consumer-owned utilities notify the Commission of any wholesale generation sales.~~

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## **§ 1 — PURPOSE OF RULE; APPLICATION**

~~— This Chapter establishes standards of conduct governing the relationship and interactions between a distribution utility and an affiliated competitive provider to promote the development of a fair and efficient competitive retail electricity market.~~

~~— A distribution utility or an affiliated competitive provider may not use its corporate structure, or any other means, to circumvent the requirements or intent of this Chapter.~~

## **§ 2 DEFINITIONS**

A. Advertising or Marketing. Advertising or Marketing is:

- 1) Any communication or activity designed or intended to increase the profitability of an entity or to increase the recipient's likelihood of purchasing service from the entity; or
- 2) Any communication or activity that could reasonably be viewed by the recipient of the communication or activity as an attempt to increase the recipient's likelihood of purchasing a service or product.

B. Affiliated Competitive Provider. Affiliated competitive provider means a competitive electricity provider whose relationship with an investor-owned transmission and distribution utility qualifies it as an affiliated interest under 35-A M.R.S.A. § 707. CMPNG is considered an affiliated competitive provider under these Standards.

C. Distribution Utility. Distribution utility means an investor-owned transmission and distribution utility that has an affiliated competitive provider.

D. Joint Advertising or Marketing. Joint advertising or marketing is any advertising or marketing that includes, directly or indirectly, references to both the distribution utility and its affiliated competitive provider. It also includes the use by the affiliated competitive provider of the same or substantially similar name or logo as the distribution utility in a way that would require a payment for good will under Chapter 820.

E. Large Investor-owned Distribution Utility. Large investor-owned distribution utility means an investor-owned transmission and distribution utility serving more than 50,000 retail customers.

F. Regulated Product or Services. A regulated product or service means the transmission or distribution of electricity, services necessary to perform those functions, services for which the utility is the provider of last resort or services the Commission requires the utility to provide, except that any service that a utility provides outside its service territory is not a regulated product or service. Regulated products and services include real property, including easements or other property rights.

~~G. Small Investor-owned Distribution Utility. Small investor-owned distribution utility means an investor-owned transmission and distribution utility serving 50,000 or fewer retail customers.~~

### § 3 STANDARDS OF CONDUCT

A. No Preference. A distribution utility may not, through a tariff provision or otherwise, give its affiliated competitive provider or customers of its affiliated competitive provider preference over nonaffiliated competitive electricity providers or customers of nonaffiliated competitive electricity providers in matters relating to any regulated product or service.

B. Service Provided Without Discrimination. All regulated products and services offered by a distribution utility, including any discount, rebate or fee waiver, must be available to all customers and competitive electricity providers simultaneously to the extent technically possible and without undue or unreasonable discrimination. Nothing in this Chapter prevents a distribution utility from entering into a special contract offering a special rate to a customer or group of customers pursuant to a rate flexibility program approved by the Public Utilities Commission under the Maine 35-A M.R.S.A. § 3195(6).

C. Posting. A distribution utility may not sell or otherwise provide regulated products or services to its affiliated competitive provider without either simultaneously posting the offering electronically on the distribution utility's Internet web site or otherwise making a sufficient offering to the market for that product or service. Provision of the product or service under the terms of a filed tariff constitutes a sufficient offering. Otherwise, a sufficient offering to the market must be approved by the Commission before the distribution utility sells or provides the product or service to its affiliated competitive provider.

D. Requests for Regulated Products. A distribution utility shall process all similar requests for a regulated product or service in the same manner and within the same period of time.

E. No Tying. A distribution utility may not condition or tie the provision of any regulated product, service or rate agreement by the distribution utility to the provision of any product or service in which an affiliated competitive provider is involved.

F. Requests for Information. A distribution utility shall process all similar requests for information in the same manner and within the same period of time. A distribution utility may not provide information to an affiliated competitive provider without a request when information is made available to nonaffiliated competitive electricity providers only upon request. A distribution utility may not allow an affiliated competitive provider preferential access to any nonpublic information regarding the distribution system, customers taking service from the distribution utility, or any other

nonpublic information that the utility has obtained as a result of its status as a provider of core utility services that is not made available to nonaffiliated competitive electricity providers upon request. A distribution utility shall instruct all of its employees not to provide any competitive electricity provider preferential access to nonpublic information.

G. Employees. Employees of a distribution utility may not share with any competitive electricity provider:

1. Any market information acquired from any other competitive electricity provider, natural gas utility or interstate pipeline, other than information that is generally publicly available, without the permission of the competitive electricity provider from which the information was acquired; or

2. Any market information developed by the distribution utility in the course of responding to requests for distribution service, other than information that is generally publicly available.

~~H. Log of Information Requests. A distribution utility shall keep a log of all requests made by a competitive electricity provider for commercial information that it has obtained by virtue of providing electricity service.. The log is subject to Commission review. The log must:~~

~~1. Contain all requests for commercial information from competitive electricity providers, including the nature and date of the request;~~

~~2. Identify, for each request, the name of the entity making the request; and~~

~~3. Describe the date and nature of the distribution utility's response to each request. The distribution utility shall protect the information contained in the log from being disclosed to any entity (except the Commission) unless, or until, the Commission determines such protection is unnecessary. Absent such a finding by the Commission, any entity (other than the distribution utility that maintains the log or the Commission) that seeks access to the information contained in the log, must file a request for such access with the Commission. At that time, the Commission will determine the appropriate level of protection for the information pursuant to its statutory authority to grant protective orders. 35-A M.R.S.A. § 1311-A.~~

I. Promotion of Affiliate; Joint Marketing.

1. Neither a distribution utility nor its affiliated competitive provider may give any appearance of speaking on behalf of the other.

2. Neither a distribution utility nor an affiliated competitive provider may in any way represent that any advantage accrues to customers or others in the use

of the distribution utility's services as a result of that customer's or others' dealing with the affiliated competitive provider.

3. A distribution utility and its affiliated competitive provider may not engage in joint advertising or marketing.

4. The distribution utility may not in any manner promote its affiliated competitive provider or any product or service offered by its affiliated competitive provider nor may the affiliated competitive provider promote any product or service offered by the distribution utility.

~~5. The Commission shall maintain a current list of all competitive providers available to customers in each distribution utility's service territory. The Commission shall update the list and rearrange the names on the list in a random sequence at least every 60 days. If a customer requests information about competitive electricity providers or where the customer may obtain generation services, the distribution utility shall provide a copy of the most recent list of competitive electricity providers issued by the Commission.~~

6. Unless the distribution utility or affiliated competitive provider is specifically asked what the relationship is between the two entities or whether the distribution utility or affiliated competitive provider has an affiliation or association with a competitive provider or distribution utility, respectively, employees of those entities may not disclose the affiliation. If they are specifically asked, employees may disclose the affiliation but must inform the questioner that:

~~a. The affiliated competitive provider is not regulated by the Public Utilities Commission;~~

b. No advantage will accrue to any customer of the affiliated competitive provider due to the affiliate's relationship with the distribution utility; and

~~c. Customers may select another competitive electricity provider.~~

The distribution utility shall submit as part of its implementation plan under Section 5 a script containing the information specified above that distribution utility and affiliated competitive provider employees shall use in responding to inquiries regarding affiliated status.

J. No Recommendation. Employees of a distribution utility may not state or provide to any customer or potential customer any opinion regarding the reliability, experience, qualifications, financial capability, managerial capability, operations capability, customer service record, consumer practices or market share of any affiliated competitive provider or nonaffiliated competitive electricity provider.

K. Sharing of Employee Prohibition. Employees of a distribution utility must be located in a separate building from the employees of the affiliated competitive provider. Employees may not be shared between a distribution utility and its affiliated competitive provider. An employee is considered to be shared if the employee performs work for both entities. The employees of a distribution utility and the employees of an affiliated competitive provider must be served by separate telecommunications and computer systems. An employee who is transferred from an affiliated competitive provider to the distribution utility cannot return to the affiliated competitive provider for at least one year.

1. Exemption.

The Commission may approve an exemption from this subsection upon a finding that:

- a. Sharing employees or facilities would be in the best interest of the public;
- b. Sharing employees or facilities would have no anticompetitive effect; and
- c. The costs of any shared employees or facilities can be fully and accurately allocated between the distribution utility and the affiliated competitive provider.

Any request for an exemption must be accompanied by a full and transparent allocation of costs for any shared facilities or general and administrative support services. The Commission shall allow a reasonable opportunity for parties to submit comments regarding any request for an exemption. An exemption is valid until the Commission determines that modification or removal of the exemption is necessary.

L. Books. A distribution utility and its affiliated competitive provider shall keep separate books of account and records, which are subject to Commission review.

M. Dispute Resolution. A distribution utility shall establish and file with the Commission, as part of its implementation plan under Section 5, a dispute resolution procedure to address complaints alleging violations of ~~35-A M.R.S.A. §§ 3205 & 3206~~; applicable Chapter 820 provisions governing the actions of the distribution utility and its affiliated competitive provider; the distribution utility's implementation plan; and this Chapter. A dispute resolution procedure must, at a minimum, designate a person to

conduct an investigation of the complaint and communicate the results of the investigation to the claimant in writing within 30 days after the complaint was received, including a description of any action taken and the complainant's right to file a complaint with the Commission if not satisfied with the results of the investigation.

1. Complaints log. The distribution utility shall maintain a log of all resolved and pending complaints. This log is subject to Commission review. The log must include, at a minimum:

- a. The name of the person or entity that filed the complaint;
- b. The date the complaint was filed;
- c. The written statement of the complaint, if any; and
- d. The date the complaint was resolved and the resolution or the reason why the complaint is still pending.

N. Separate Records. A distribution utility shall maintain its books of account and records of its transmission and distribution operations separately from those of its affiliated competitive provider. These books of account and records are subject to Commission review.

O. Implementation Plan. A distribution utility shall maintain in a public place and file with the Commission current written procedures implementing the standards of conduct established by these Standards. ~~35-A M.R.S.A. §§ 3205 & 3206 and this Chapter. A copy of this Chapter must be posted in the distribution utility's offices in the same manner as required for minimum wage information under 26 M.R.S.A. § 668. The distribution utility and its affiliated competitive provider shall provide every employee with a copy of the implementation plan and any amendments to the plan.~~ The implementation plan must include procedures to train employees of the distribution utility and its affiliated competitive provider in procedures necessary to ensure compliance with these Standards. ~~35-A M.R.S.A. §§ 3205 & 3206 and this Chapter.~~ The implementation plan must be in detail sufficient to enable customers and the Commission to determine that the company is in compliance with these Standards. ~~35-A M.R.S.A. §§ 3205 & 3206 and this Chapter.~~

~~P. Notice of Stock Acquisition. A distribution utility must immediately notify the Commission if another entity acquires 10% or more of the distribution utility's stock or achieves 10% ownership of the distribution utility's stock after June 26, 1997.~~

Q. No Subsidization. A distribution utility may not subsidize the business of its affiliated competitive provider at ratepayer expense in any manner not specifically authorized under this section.

R. Compliance with Chapter 820. A distribution utility and its affiliated competitive provider must comply with all applicable provisions of Chapter 820.

#### **§ 4 — MARKET SHARE LIMITATIONS**

~~———— No competitive electricity provider affiliated with a large investor-owned distribution utility may sell or contract to sell more than 33% of the total kilowatt-hours sold at retail within its affiliated distribution utility's service territory over a calendar year. Any standard offer service provided within the distribution utility's service territory by an affiliated competitive provider under Chapter 302 is included within the 33% limitation. No competitive electricity provider affiliated with a large investor-owned distribution utility may bid to provide more than 20% of the total standard offer service kilowatt-hours in its affiliated distribution utility's service territory.~~

~~———— If a distribution utility has more than one affiliated competitive provider, all limits and sanctions will be determined based on the total kilowatt-hours sold, contracted for sale or bid for sale, respectively, by all of its affiliated competitive providers in the aggregate.~~

~~———— A. ——— Reports. By May 1st of each year, each affiliated competitive provider shall report to the Commission:~~

~~———— 1) ——— The total kilowatt-hours it sold at retail between January 1 and December 31 of the previous year within its affiliated distribution utility's service territory; and,~~

~~———— 2) ——— The total kilowatt-hours it contracted to sell at retail between January 1 and December 31 of the previous year within its affiliated distribution utility's service territory.~~

~~By May 1st of each year, each distribution utility shall report to the Commission the total kilowatt-hours sold at retail between January 1 and December 31 of the previous year within its service territory.~~

~~———— B. ——— Sanctions. A competitive provider affiliated with a large investor-owned distribution utility that sells or contracts to sell more than 33% of the total kilowatt-hours sold at retail in its affiliated distribution utility's service territory or bids to sell more than 20% of the standard offer kilowatt-hours in its affiliated distribution utility's service territory is subject to the sanctions provided in Section 7.~~

#### **§ 5 IMPLEMENTATION PLAN**

~~On or before April 1, 2000, CMP and CMPNG Before an affiliated competitive provider is authorized, or if an affiliated competitive provider has already been authorized, within 30 days after the effective date of this Chapter, the distribution utility must have filed with the Commission an implementation plan in compliance with Section 3(P).~~



~~A. Effective Date. An implementation plan takes effect 30 days after it is filed with the Commission unless the Commission suspends the effectiveness of all or part of the plan, in which case the suspended portion takes effect upon Commission approval.~~

~~\_\_\_\_ B. Changes. A distribution utility shall file with the Commission any change to an implementation plan. A change to an implementation plan takes effect 30 days after the change is filed with the Commission unless the Commission suspends the effectiveness of all or part of the change, in which case the suspended portion takes effect upon Commission approval.~~

C. Commission Investigation. The Commission may open an investigation into a distribution utility's implementation plan or a distribution utility's compliance with its plan at any time and may order changes to be made in an implementation plan as a result of the investigation.

## § 6 AUDITS

The Commission ~~shall~~ may audit the records of each distribution utility and affiliated competitive provider subject to this Chapter to ensure compliance with ~~35-A M.R.S.A. §§ 3205 and 3206~~, applicable Chapter 820 provisions, the distribution utility's implementation plan, and ~~this Chapter~~ these Standards.

~~\_\_\_\_ A. Audit Schedule. For the first three years following adoption of this Chapter, the Commission shall annually audit each distribution utility and affiliated competitive provider. Thereafter, the Commission shall audit investor-owned distribution utilities and affiliated competitive providers at least once every three years but may audit them more frequently at the Commission's discretion.~~

## § 7 SANCTIONS

This section governs sanctions applicable to violations of ~~35-A M.R.S.A. §§ 3205, 3206 and this Chapter~~ these Standards. For purposes of imposing a sanction under this Section, the provisions of a distribution utility's implementation plan and Chapter 820 are incorporated into this Chapter. Penalties collected pursuant to this section must be deposited in the Public Utilities Commission Reimbursement Fund.

A. General Administrative Penalties; Disgorgement. The Commission may, in an adjudicatory proceeding, impose an administrative penalty of up to \$100,000 for a violation of ~~35-A M.R.S.A. §§ 3205, 3206 or this Chapter~~ these standards. Each day a violation continues constitutes a separate offense. In addition, the Commission may, in an adjudicatory proceeding, require disgorgement of profits or revenues realized as a result of a violation of ~~35-A M.R.S.A., §§ 3205, 3206 or this Chapter~~ these Standards.



~~B. Violations of the 33% Market Share Limitation. If an affiliated competitive provider exceeds the 33% market share limitation imposed by Section 4, the penalty is determined according to the following:~~

~~1. If in the calendar year reported pursuant to Section 4(A) (current calendar year), the actual retail sales (measured in kilowatt-hours) of an affiliated competitive provider plus its contracted retail sales (measured in kilowatt-hours) exceed 33% but not 35% of the total retail sales in its affiliated distribution utility's service territory in the year previous to the year reported pursuant to Section 4(A) (prior calendar year), the penalty equals the difference between the average revenue per kilowatt-hour the affiliated competitive provider received for sales in the service territory of its affiliated distribution utility during the current calendar year and the New England independent system operator average market clearing prices for capacity and energy for the current calendar year, multiplied by the kilowatt-hours in excess of 33% of the total retail kilowatt-hours sold within the affiliated distribution utility's service territory in the prior year, up to a maximum penalty of \$100,000 per day.~~

~~For example, assuming the total retail sales within a distribution utility's service territory in calendar year 2002 was 9,000,000,000 kWhs, an affiliated competitive provider could not sell more than 2,970,000,000 kWhs ( $9,000,000,000 \times 0.33 = 2,970,000,000$ ) within that distribution utility's service territory in calendar year 2003 without incurring a penalty. If, hypothetically, in 2003 the affiliated competitive provider sold 34% of the 2002 total retail kWh sales within its affiliated distribution utility's territory, received \$91,800,000 in revenues associated with those sales and the average market clearing price for capacity and energy in 2003 was \$0.025 per kWh, a penalty of \$450,000 would be due: [ $(0.34 \times 9,000,000,000 \text{ kWhs} = 3,060,000,000 \text{ kWhs}$ ; excess sales =  $3,060,000,000 - 2,970,000,000 = 90,000,000 \text{ kWhs}$ ; average revenue per kWh =  $\$91,800,000 / 3,060,000,000 \text{ kWhs} = \$0.030$  per kWh sale price; therefore the penalty =  $90,000,000 \times (\$0.030 - \$0.025) = \$450,000$ ].~~

~~2. If the affiliated competitive provider's actual retail sales (measured in kilowatt-hours) plus its contracted retail sales (measured in kilowatt-hours) in the current calendar year exceed 35% of the total retail sales in its affiliated distribution utility's service territory in the prior calendar year, the penalty equals the penalty as determined in subsection 1 plus the average revenue per kilowatt hour the affiliated competitive provider received for sales in the service territory during the current calendar year multiplied by the kilowatt hours in excess of 35% of the total retail kilowatt-hours sold within the affiliated distribution utility's service territory in the prior year, up to a maximum penalty of \$100,000 per day.~~

~~For example, using the same assumptions as in subsection 1 except that in 2003 the affiliated competitive provider sold 38% of the 2002 total retail kWh sales within that distribution utility's territory and received \$102,600,000 in revenues associated with those sales, a penalty of \$9,000,000 would be due: [ $(0.38 \times 9,000,000,000 \text{ kWhs} = 3,420,000,000 \text{ kWhs}$ ; sales in excess of 33% but up to 35% =  $(0.35 \times 9,000,000,000) - 2,970,000,000 = 180,000,000 \text{ kWh}$ ; sales in excess of 35% =~~

~~$3,420,000,000 - (0.35 * 9,000,000,000 \text{ kWhs}) = 270,000,000 \text{ kWhs}$ ; therefore the penalty =  $180,000,000 * (0.030 - 0.025) + (270,000,000 * 0.030) = \$900,000 + \$8,100,000 = \$9,000,000$ ].~~

~~C. Divestiture. The Commission shall require a distribution utility to divest an affiliated competitive provider if the Commission determines in an adjudicatory proceeding that:~~

~~1. The distribution utility or its affiliated competitive provider has knowingly violated Title 35-A M.R.S.A. § 3205, or this Chapter and the violation resulted or had the potential to result in substantial injury to retail consumers of electric energy or to the competitive retail market for electric energy; or~~

~~2. An affiliated competitive provider obtains an unfair market advantage as a result of an entity's ownership of 10% or more of the stock of the distribution utility.~~

## ~~§ 8 CONSUMER-OWNED UTILITIES~~

~~A consumer-owned utility must report to the Commission any wholesale sale or sales of generation service that, over any 12-month period, cumulatively exceed 5% of the total kilowatt hours sold at retail by the utility over the same period. The report must describe the details of the transaction and explain why the sale was incidental and necessary to reduce the cost of providing retail service.~~

## ~~§ 9 WAIVER OR EXEMPTION~~

Upon the request of any person subject to this Chapter or upon its own motion, the Commission may, for good cause, waive any requirement of this Chapter that is not required by statute. The waiver may not be inconsistent with the purposes of this Chapter or Title 35-A. The Commission, the Director of Technical Analysis, or the Presiding Officer assigned to a proceeding related to this Chapter may grant the waiver.

~~**BASIS STATEMENT:** The factual and policy basis for this rule is set forth in the Commission's Statement of Factual and Policy Basis and Order Provisionally Adopting Rule, Commission Docket No. 98-457, issued on December 7, 1998, and in the Commission's Order Finally Adopting Rule and Statement of Policy Basis issued on June 29, 1999, and in the Commission's Supplemental Order Finally Adopting Rule and Statement of Policy Basis, issued on September 29, 1999. Copies of this Statement and Order have been filed with this rule at the Office of the Secretary of State. Copies may also be obtained from the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018.~~

~~**AUTHORITY:** 35-A M.R.S.A. §§ 104, 111, 3205, 3206, 3207, 3203(9)  
Resolves 1999, ch. 36; P.L. 1999, ch. 398, Sec. G-5.~~

~~**EFFECTIVE DATE:** This rule was approved as to form and legality by the Attorney General on 10/1/99. It was filed with the Secretary of State on 10/5/99 and will be effective on 11/4/99.~~

**Appendix C**  
**Redacted**

Table 1  
Comparison Of Right of Way Proceeds

	Maritimes & Northeast (\$000)	PNGTS (\$000)	Joint (\$000)	CMPNG (\$000)
Gross Proceeds	\$	\$	\$	\$
Inspector Costs		( )	( )	
Selling Expenses	( )	( )	( )	( )
Land Purchases				( )
Regulatory Expense				( )
Net Proceeds				
Length (miles)	26.30	38.00	44.70	1.86
Net Proceeds per mile (\$000)	\$	\$	\$	\$

Possible Alternative Calculations of Net Proceeds (\$000 per mile)

CMPNG proceeds net of inspector, selling & regulatory costs only	\$
CMPNG proceeds net of inspector, selling & land costs only	\$
CMPNG proceeds net of inspector & selling costs only	\$

Notes:

Gross Proceeds & Length	- 2-ADV-20
Selling Expense, CMPNG	- Response to 1/6/00 Procedural Order, Exh. 1
Selling Expense, Other	- 03-ADV-06
Land Costs, CMPNG	- ADV-02-04
Regulatory Expense	- Response to 1/6/00 Procedural Order
	- The response estimated a range of \$-,
	if \$ then net proceeds would total \$
	or \$ per mile